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In the Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND OAKLAND PRESS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the Board properly applied a right-of-control test in determining that, in the circumstances of this case, certain newspaper carriers are employees within the meaning of the National Labor Relations Act, so that the district managers who direct them are supervisors excluded from the coverage of the Act.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A6-A14, A15-A19, and A1-A5) are reported at 606 F.2d 689, 682 F.2d 116, and 735 F.2d 969. The decisions and orders of the National Labor Relations Board (Pet. App. A20-A39, A40-A50, and A51-A55) are reported at 229 N.L.R.B. 476, 249 N.L.R.B. 1081, and 266 N.L.R.B. 107.

JURISDICTION

The judgment of the court of appeals (Pet. App. A56-A57) was entered on May 31, 1984. A petition for rehearing was denied on August 15, 1984 (Pet. App. A58). On November 2, 1984, Justice O'Connor extended the time for

filing a petition for a writ of certiorari to and including December 17, 1984 (Pet. App. A59), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are reproduced at Pet. App. A60-A62.

STATEMENT

1. Respondent Oakland Press Company (the Company) publishes a daily afternoon newspaper in suburban Detroit, Michigan. From 1970 to 1976 petitioner (the Union) was the collective bargaining representative of the Company's circulation department district managers, who direct the work of the Company's home delivery newspaper carriers.[1] Upon expiration of the parties' collective bargaining agreement in May 1976, the Company refused to continue bargaining with the Union, claiming that the district managers were supervisors within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11). Pet. App. A22-A23, A53. Section 14(a) of the Act, 29 U.S.C. 164(a), provides that no employer shall be compelled to treat

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[1]In 1970, the Union filed a petition with the Board seeking to represent the district managers. At that time the parties agreed to a consent election without a formal direction of election by the Board's Regional Director. In that agreement the parties stipulated that the newspaper carriers were not "employees" covered by Section 2(3) of the Act, 29 U.S.C. 152(3), and that the district managers therefore were not supervisors, but rather employees entitled to bargain collectively under the Act. Following a hearing, the Regional Director refused to approve the consent agreement and submitted the issue of the status of the carriers to the Board. Before the Board decided that issue, the Union withdrew its petition from the Board, and the parties asked the Michigan Employment Relations Commission to conduct a secret ballot election. After the Union won that election, the State certified the Union as bargaining representative of the district managers. Pet. App. A53.

supervisors as employees for purposes of, inter alia, the requirement that an employer bargain collectively with the representatives of its employees (see 29 U.S.C. 158(a)(5)).

The Company employs approximately 1,250 carriers to deliver papers by foot in local neighborhoods; the foot carriers generally are from 11 to 14 years old, with an average length of service of six months to a year. In addition, there are approximately 35 to 40 adult motor route carriers who service more remote areas. Pet. App. A41, A43. All carriers are directly responsible to one of 15 district managers, who in turn report to one of two zone managers. A circulation manager has overall responsibility for the circulation department. *Id.* at A41.

The Company, through the district managers, instructs and supervises the carriers concerning the proper time, method, and location of delivery, collection from subscribers, and mailing of payments to the Company (Pet. App. A42-A44). Carriers are hired by the district managers, who designate specific routes within their districts and assign a carrier to each. Carriers receive their papers at "drops" designated by the district managers. Pet. App. A41, A43-A44; C.A. App. 84, 154-155.[2] Complaints from subscribers are normally phoned into the circulation department and relayed to the district managers. District managers attempt to resolve complaints directly with subscribers or by instructing carriers on the proper method of delivery. Pet. App. A44; C.A. App. 83, 101. If complaints continue, a district manager may arrange a meeting with the subscriber and carrier to resolve the problem (*id.* at 83). District managers assist carriers in collecting from delinquent subscribers. Except when a subscriber moves, a carrier may not stop delivery without an investigation and authorization by the

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[2]"C.A. App." refers to the appendix to petitioner's brief in support of its petition to review the Board's first supplemental decision and order.

district manager. At any given time a district manager generally will be required to give special attention to the performance of about 30% of his carriers. Pet. App. A44.

Carriers are expected to provide substitutes satisfactory to the district manager when they are unable to work. However, the district manager has the ultimate responsibility for finding a substitute when the carrier fails to do so. District managers decide whether to split or consolidate routes. They transfer carriers from one route to another and make recommendations concerning which carriers should be cited for excellent performance or deemed eligible for participation in a paid scholarship program. If a district manager concludes that a carrier should not be required to deliver to a particular subscriber because of some hazardous condition, the manager may arrange an alternative means for delivery. Pet. App. A44; C.A. App. 158-159. District managers have the authority to decide, in consultation with their own supervisors, whether to terminate carriers who perform their duties in an unsatisfactory manner (Pet. App. A44-A45).

2. Following the Company's refusal to bargain, the Union filed an unfair labor practice charge with the Board. In its initial decision (Pet. App. A20-A39) the Board concluded that the carriers who deliver the Company's newspapers were not "employees" under the Act and that the district managers who supervise the carriers therefore were employees rather than statutory supervisors because they exercised no supervisory authority over employees.[3] However, the Board declined to decide whether the carriers were

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[3]The Board stated that, although "[i]t is difficult to conceive that [carriers] * * * are entrepreneurs in the traditional sense of an independent contractor," carriers should not, "as a matter of policy," be considered employees under the Act in light of the "minimal" nature of the work and the fact that the Company "has always treated [them] as

in fact independent contractors (*id.* at A25). The Board concluded that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union in its capacity as the collective bargaining representative of the district managers. Pet. App. A20-A21, A27, A35-36.

3. The court of appeals declined to enforce the portion of the Board's order relating to the district managers (Pet. App. A6-A14). The court stated that "[t]he record clearly indicates" that the district managers possess and exercise supervisory authority over the carriers and that "[t]he determinative factor" with respect to whether the managers are employees or supervisors "is whether the paper carriers are employees * * * or are independent contractors" (*id.* at A12-A13). The court concluded that the Board erred in failing to determine the status of the carriers under Section 2(3) of the Act, 29 U.S.C. 152(3). The court therefore remanded for determination of the status of the carriers. Pet. App. A14.

4. On remand the Board concluded that the carriers are employees and that the district managers are therefore supervisors within the meaning of the Act (Pet. App. A40-A50). The Board applied the right-of-control test, under which "an employer-employee relationship exists when the

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nonemployees" (Pet. App. A26). The Board relied on the facts that the Company does not withhold social security and other taxes from the carriers' paychecks, that until 1973 carriers were required to post a $10 bond for their route, and that in the 1970 consent election agreement (see note 1, *supra*) the Company stipulated that carriers were nonemployees (*ibid.*).

The Board also found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with petitioner in its capacity as representative of a unit of circulation department truckdrivers and city dealer drivers and ordered the Company to bargain (Pet. App. A24, A27-A34). That portion of the Board's order, which was enforced by the court of appeals (*id.* at A7-A11), is not at issue here.

employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result" (*id.* at A45). Although some factors pointed toward an independent contractor status for the carriers, the Board concluded that those factors were "clearly outweighed by * * * factors which, notwithstanding the characterization of the carriers in the route agreement as 'independent,' demonstrate their employee status" (*id.* at A46). The Board concluded that, "[i]n view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income," the carriers must be classified as employees (*id.* at A47). The Board found further that the district managers "hire, discharge, assign, transfer, and responsibly direct the carriers" and are therefore supervisors under the Act. The Board therefore withdrew its finding that the Company violated Section 8(a)(5) and (1) by refusing to bargain with the Union in its capacity as representative of the district managers. Pet. App. A47.

5. The court of appeals concluded that the Board's finding that the carriers are employees and the district managers supervisors under the Act was supported by substantial evidence (Pet. App. A15-A19). However, the court again remanded the case to the Board for consideration of petitioner's contention that the Company should be equitably estopped from asserting that the carriers are employees and the district managers supervisors on the ground that it was "inconsistent with its past conduct and representations" (*id.* at A18).

6. On remand, the Board rejected petitioner's contention that the Company was equitably estopped (Pet. App. A51-A55). The Board held that neither the Company's stipulation in the 1970 consent election agreement submitted to the Board (see note 1, *supra*), petitioner's certification by

the State of Michigan, nor the parties' prior collective bargaining relationship precluded the Company from contesting the status of the district managers, "because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act" (*id.* at A54 (footnote omitted)). The Board also concluded that even if equitable estoppel principles could be applied, the detriment to petitioner, in the form of the Company's refusal to continue recognizing petitioner as bargaining representative of the district managers, was not attributable to any misleading conduct on the part of the Company. The Board noted that petitioner had been aware that there was a question concerning the status of the carriers and district managers from the time the Regional Director rejected the 1970 consent election agreement (see note 1, *supra*). *Id.* at A55.

7. The court of appeals enforced the Board's order (Pet. App. A1-A5). The court agreed with the Board that the Company's prior conduct could not determine the proper classification of the carriers or district managers under the Act and that application of equitable estoppel in this case would frustrate a fundamental purpose of the Act, *i.e.*, not requiring employers to bargain collectively with workers who are connected with management (*id.* at A4-A5).

ARGUMENT

Petitioner contends that the Board erred in concluding that the Company's district managers are supervisors within the meaning of the National Labor Relations Act. Petitioner does not dispute that the district managers exercise supervisory authority over the carriers. Nor does it challenge the court of appeals' conclusion that substantial evidence supports the Board's finding that the carriers are employees under the right-of-control test. Petitioner contends, however, that the Board should not have used the right-of-control test to determine the status of the carriers,

but instead should have excluded the carriers from employee status "on policy grounds" (Pet. App. A11). That contention lacks merit.

1. When Congress enacted the Taft-Hartley amendments in 1947, it specifically excluded from the definition of "employee" under Section 2(3) of the Act, 29 U.S.C. 152(3), "any individual having the status of an independent contractor." As this Court explained in *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 256 (1968) (footnote omitted), Congress intended by this amendment "to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." Congress "thereby imported the common law 'right of control' test as a standard of statutory coverage." R. Gorman, *Basic Text in Labor Law* 29 (1977). See, *e.g.*, *NLRB* v. *Associated Diamond Cabs, Inc.*, 702 F.2d 912, 919-920 (11th Cir. 1983); *Air Transit, Inc.* v. *NLRB*, 679 F.2d 1095, 1098 (4th Cir. 1982); *NLRB* v. *Maine Caterers, Inc.*, 654 F.2d 131, 132-133 (1st Cir. 1981), cert. denied, 455 U.S. 940 (1982); *NLRB* v. *A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979); *Local 777, Democratic Union Organizing Committee* v. *NLRB*, 603 F.2d 862, 872-873 (D.C. Cir. 1978); *Merchants Home Delivery Service, Inc.* v. *NLRB*, 580 F.2d 966, 972-973 (9th Cir. 1978); *NLRB* v. *Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir.), cert. denied, 335 U.S. 845 (1948).

As the Court recognized in *United Insurance Co.*, 390 U.S. at 256, in requiring that the Board and courts apply common law principles in distinguishing employees from independent contractors, Congress intended specifically to override the decision in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). In *Hearst* the Court had upheld a more expansive approach under which the Board could determine whether individuals were covered by the Act on the basis of its view of the policies and purposes of the Act.

In that case, the Board had found that "newsboys" distributing newspapers on street corners were "employees" under the Act, notwithstanding evidence of their independent contractor status under the common law, based on the Board's view that extending statutory coverage to the "newsboys" would further the policies of the Act in favor of collective bargaining. *Id.* at 126-129, 131-132.[4] In specifically excluding independent contractors from the definition of "employee" in the 1947 amendments, Congress indicated clearly that the common law right-of-control test, rather than the Board's own policy determinations, was to govern the scope of statutory coverage, and that no special policy-based considerations apply to news carriers under Section 2(3). See *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-168 (1971).

The description of the facts at pages 3-4, *supra*, shows that the Board properly applied the right-of-control test in concluding that the carriers are employees, and that the district managers are therefore supervisors, within the meaning of the Act. As we noted above, petitioner does not challenge the court of appeals' conclusion that substantial evidence supported the Board's finding on this point. And even if the petition could be read to raise this issue, it is not one that would warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. This Court's decisions in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), and *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), do

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[4]The "newsboys" in *Hearst*, unlike the carriers involved here, were full-time adult vendors who frequently bought and sold among themselves the locations from which they sold papers, without objection from or knowledge of the newspapers; sold competing newspapers and periodicals from their newsstands; hired assistants and relief men; and made arrangements among themselves for the sale of competing and left-over papers. 322 U.S. at 116, 119 n.17.

not support petitioner's contention that the Act "implicitly" excludes news carriers from employee status. In *Bell Aerospace Co.*, 416 U.S. at 274-290, the Court held that the legislative history of the Taft-Hartley amendments and the longstanding interpretation of the Board demonstrated that Congress intended to exclude employees properly classified as "managerial" from the definition of "employee" in Section 2(3). Contrary to petitioner's characterization (Pet. 11), in *Hendricks County* the Court rejected the claim that Congress had implicitly excluded all "confidential employees" from the statutory definition of "employee"; the Court simply approved the Board's practice of excluding from bargaining units certain employees with access to confidential labor relations information of the employer. Neither case supports the contention that, where Congress has mandated application of a right-of-control test for distinguishing employees from independent contractors, the Board is free to create an exclusion on policy grounds for individuals who otherwise qualify as employees under that test.[5]

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[5]Petitioner's reliance (Pet. 16) on *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co., supra*, is also misplaced. There the Court in dicta stated that in doubtful cases not involving the employee/independent contractor analysis "resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." The Court made clear, however, that the general agency principles mandated by the Taft-Hartley amendments may "not be ignored in distinguishing 'employees' from independent contractors." 404 U.S. at 168.

The Board decisions petitioner cites at Pet. 11-12 are similarly inapposite. In *Firmat Mfg. Corp.*, 255 N.L.R.B. 1213, 1214 (1981), enforced, 97 Lab. Cas. (CCH) ¶ 10,153 (3d Cir. 1982), and *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 253 (1976), the Board found that a high school cooperative education student hired as an apprentice and hospital interns and residents were students rather than employees, and that the work they performed was primarily part of their education rather than part of an employment relationship. Similarly, in *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1374 (1982), the Board concluded that clients of a sheltered workshop for the handicapped performed work as part of their therapy and rehabilitation, not as

3. Petitioner contends (Pet. 14-23) that, as a matter of "policy" (*id.* at 16, 18), the Board should have refused to find the news carriers to be employees and the district managers supervisors because of the Company's past treatment of them and in order to preserve the established collective bargaining relationship between the Company and the district managers. The Board and the court of appeals properly rejected that contention.[6]

The Act contemplates a distinct line between management and labor. See *Hendricks County*, 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part). To that end Section 14(a) of the Act, 29 U.S.C. 164(a), provides that no employer shall be compelled to bargain collectively with individuals possessing supervisory status. Since employer recognition of supervisors for bargaining purposes is purely voluntary under the Act, it is settled that an employer is not precluded from claiming that individuals with a prior history of collective bargaining are supervisors with whom it no longer wishes to bargain, even when the

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"employees" under the Act. Here, in contrast, the work done by the news carriers is not related to educational or therapeutic concerns. In *San Francisco Art Institute*, 226 N.L.R.B. 1251, 1251-1252 (1976), the Board, without deciding whether art students who worked part-time as janitors were "employees" under Section 2(3), held that the students did not constitute an appropriate bargaining unit because of the temporary and casual nature of their work and their primary status as students.

[6]This contention appears to be a variation on petitioner's argument below that the Company is equitably estopped from contesting the status of the carriers and district managers. The Board correctly concluded that, even if equitable estoppel principles would apply in this context, petitioner had not established the traditional elements of estoppel, since any detriment it suffered did not result from misleading conduct on the part of the Company (Pet. App. A55). And see *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944) (declining to apply concept of estoppel where it would "render the Board powerless to prevent an obvious frustration of the Act's purposes").

duties of those individuals remain unchanged. *Washington Post Co.*, 254 N.L.R.B. 168, 168-169 (1981); *Western Colorado Power Co.*, 190 N.L.R.B. 564, 564 (1971); *Brotherhood of Locomotive Firemen & Enginemen*, 145 N.L.R.B. 1521, 1525 n.10 (1964). Under that principle, neither the Company's stipulation in the 1970 consent agreement (which was rejected by the Board, see note 1, *supra*), nor the fact that certain Company documents refer to the carriers as "independent," precludes the Board from determining the actual status of the carriers and district managers under the Act. See *NLRB* v. *Boyer Brothers, Inc.*, 448 F.2d 555, 563-564 (3d Cir. 1971), cert. denied, 409 U.S. 878 (1972); *NLRB* v. *Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir.), cert. denied, 355 U.S. 829 (1957); *Virginian-Pilot/Ledger Star*, 241 N.L.R.B. 575, 575 (1979); *Eureka Newspapers, Inc.*, 154 N.L.R.B. 1181, 1184 (1965).[7]

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[7]The Board decisions cited by petitioner (Pet. 17-18) in support of its claim that the Board ordinarily holds employers to their past characterization of news carriers' status, regardless of the evidence of their actual status under the Act, are inapposite. In *Newsday, Inc.*, 171 N.L.R.B. 1456, 1456 (1968), the employer apparently conceded before the Board that its carriers were independent contractors, not employees; moreover, the Board concluded that the facts in the record supported that classification. In *Eureka Newspapers, Inc.*, 154 N.L.R.B. at 1184, the Board stated expressly that the fact that a written agreement with the newspaper and district dealers defined the relationship as one of independent contractor was not controlling. The Board found in *Suburban Newspaper Group*, 195 N.L.R.B. 438, 438 (1972), that district managers did not supervise carriers when the record showed that the supervisors did not responsibly direct the carriers and exercised no real independent discretion with respect to hiring and replacement of carriers. In *Buffalo Courier-Express, Inc.*, 129 N.L.R.B. 932, 936-937 (1960), the Board concluded on the basis of the facts in the record that circulation salesmen did not exercise supervisory functions as to distributors. In *Kansas City Star Co.*, 76 N.L.R.B. 384, 384-388 (1948), the employer contended, and the Board found, that carriers were independent contractors, based on evidence that they enjoyed considerable control over their earnings and independence in leasing and transferring routes,

Petitioner errs in contending (Pet. 22) that under the decision below newspapers will be able to abrogate established collective bargaining relationships with circulation managers *solely* by contesting the status of news carriers. Even when carriers are shown to be employees within the meaning of Section 2(3), the Board will find circulation managers to be supervisors only where the record contains sufficient evidence that the managers possess supervisory authority. Here, it is undisputed that the managers supervise the carriers.

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hiring assistants, and making deliveries. And the Board concluded in *San Antonio Light Division*, 130 N.L.R.B. 619, 629 (1961), that route dealers were employees, based on their limited opportunities for profit, the strict regulation of the dealers' status with respect to carriers, and the detailed control exercised by the newspaper over the dealers' methods of operation. In none of these cases did the Board suggest that some prior characterization of the individuals at issue would be dispositive of their status under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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